



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-85

DAVID B. BOONE, OVAL MCCOY, JR.
AND MCCOY FARMS, INC., *Petitioners,*

VS.

J & M MCKEE, A PARTNERSHIP COMPOSED OF
JOHN B. MCKEE, JR., AND MARGARET MCKEE,
Respondents.

**RESPONSE TO THE PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT
OF ARKANSAS**

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August 16, 1978

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The respondents, J & M McKee, a partnership composed of John B. McKee, Jr. and Margaret McKee, respectfully pray that the petition for a writ of certiorari filed herein by the petitioners, David B. Boone, Oval McCoy, Jr. and McCoy Farms, Inc., to review the judgment of the Arkansas Supreme Court entered in this proceeding on April 17, 1978, be denied.

STATEMENT OF THE CASE

The petitioners gave respondents a deed of trust on lands in Ouachita County, Arkansas, as security for a promissory note. After default, the respondents instituted foreclosure proceedings in the Chancery Court of Ouachita County, Arkansas.

The petitioners were represented by T. H. Freeland, III, a member of the Mississippi bar, and John E. Gaughan, III, an Arkansas attorney. The respondents were represented by Robert C. Compton and Eugene D. Bramblett, Arkansas attorneys, in association with Edward T. Hamlet, a member of the Tennessee bar.

At the beginning of the trial, counsel for the respondents requested the rule and asked the court to exclude as potential witnesses, Eugene D. Bramblett, Edward T. Hamlet and John E. Gaughan, III R. 88-90. Upon the granting of the motion, petitioners' Mississippi counsel moved for a continuance until another Arkansas counsel could be obtained R. 90. That motion was overruled and the trial proceeded with the petitioners represented by their Mississippi counsel.

The trial court entered a decree of foreclosure, R. 41-49, and, on appeal to the Supreme Court of Arkansas, the petitioners asserted, among other things, that the trial court abused its discretion by excluding their Arkansas counsel from the courtroom during the trial.

The Supreme Court of Arkansas affirmed the trial court's decree of foreclosure and held that, although the trial court erred in excluding the petitioners' Arkansas attorney from the courtroom, there was no prejudice to petitioners in the ultimate result and, therefore, the harmless error rule applied, Appendix A at 4a-5a.

REASONS FOR DENYING THE WRIT

1. The Case Does Not Present a Federal Question of Substance Not Heretofore Determined by This Court.

The petitioners ask this court to grant the writ of certiorari to determine the scope of due process as applied to the right to counsel in civil proceedings.

The petitioners cite *Powell v. Alabama*, 287 U.S. 45 (1932) which dealt with the issue of requiring local counsel where the defendants were represented in a state criminal trial by an out of state attorney. The petitioners also rely on this court's decisions in *Chandler v. Freitag*, 348 U.S. 3 (1954), and *Holloway v. Arkansas*, 98 S. Ct. 1173 (1973). In *Chandler* the issue involved the refusal of the trial court to grant a continuance to allow a defendant in a criminal trial time to employ counsel of his own choice. *Holloway* involved the issue of the trial court's refusal to appoint separate counsel for three co-defendants in a state criminal trial.

The *Powell-Chandler-Holloway* line of decisions, on which the petitioners rely, are factually distinct from the case at bar.

Here, from the time of their first appearance in this action, the petitioners were represented by co-counsel of their own choice, T. H. Freeland, III, and John E. Gaughan, III. Both attorneys signed the answer and counterclaim, which was the initial pleading filed on behalf of the petitioners, R. 24-28, and this practice continued with the filing of all subsequent pleadings.

Throughout the trial in the court below, the petitioners were represented by T. H. Freeland, III, one of their attorneys of choice. They now argue, as they did before the Supreme Court of Arkansas, that with the exclusion of their Arkansas counsel from the courtroom, they were left only with their Mississippi counsel, whose familiarity with Arkansas law and trial procedure was somewhat limited. Yet, on the issue of the admissability of parole evidence which was the only issue in the trial requiring particular knowledge

of Arkansas law, the petitioners' Mississippi counsel cited four Arkansas cases in support of his position, R. 93-95. That the petitioners were ably represented by their Mississippi counsel in the court below is self evident. The petitioners, even at this late date, have failed to point out any evidence or legal arguments which were available, but not presented by their Mississippi counsel.

The Arkansas Supreme Court, reviewing the case de novo, found that the petitioners had not been prejudiced by the exclusion of their Arkansas counsel from the courtroom. Justice Fogleman, in the majority opinion, said:

"We do not see how appellants have been prejudiced by the exclusion of its only Arkansas attorney from the proceedings. The facts seem to be undisputed. The legal question seems to have been adequately presented. It has been presented here on trial de novo and the law firm of the excluded attorney has apparently participated in appellants' brief, as its name appears thereon. Yet no attempt was made to have a review or rehearing in the trial court with the participation of Arkansas counsel or to offer evidence that had not been offered at the trial or to present any legal arguments that might have, but had not, been made. We find no prejudice to appellants by the exclusion of their Arkansas attorney on the possibility that he might be called as a witness by appellees." [Appedix A at 4a, 5a]

In the case at bar, unlike the *Powell-Chandler-Holloway* line of decisions, the petitioners were represented in the court below by able counsel of their own choice. There was no absolute denial of the right to counsel as in *Goldberg v. Kelly*, 397 U.S. 254 (1970) which was

the only additional pronouncement of significance in a civil case cited by the petitioners.

Since the issue of the denial of the right to counsel in a civil proceeding is factually absent in the case at bar, the writ should be denied.

2. The Decision of the Arkansas Supreme Court Does Not Conflict With the Decisions of This Court in Criminal Cases.

The petitioners assert that the denial of the right to retained counsel clearly falls within this court's holding in *Chapman v. California*, 386 U.S. 18 (1976), that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." As such, the petitioners assert that the "harmless error" approach utilized by the court below has no precedential support.

Chapman dealt with the constitutionality of prosecutorial comment on the failure of an accused to testify in a criminal case. In rejecting the proposition that all federal constitutional errors must always be deemed harmful, this court simply reaffirmed the principle that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Fahy v. Connecticut*, 375 U.S. 85 (1963) was the basis for this court's holding in *Chapman*. In *Fahy*, this court said:

"The question is whether there is any reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial." (375 U.S. 87)

Applying the standard announced in *Chapman*, the Arkansas Supreme Court properly ruled that the trial court's error in excluding the petitioners' Arkansas counsel from the courtroom was not prejudicial and, therefore, the harmless error rule applied. Justice Fogleman, in the majority opinion, commenting on the sole defense of usury, said:

"When we consider the note in question in light of the circumstances under which it was executed, and the evidence in the light most favorable to appellants, appellants' burden was *insurmountable* and only one result can be reached, i.e., the one reached at the trial court." [Appendix A at 8a (Emphasis Added)]

On the issue of the trial court's exclusion of petitioners' Arkansas counsel from the courtroom and the refusal to grant a continuance, Justice Fogleman, for the majority, noted:

"Where the decision and judgment is correct on the undisputed evidence, the appellant is in no position to complain. *Yuttermann v. Grier*, 112 Ark. 366, 166 S.W. 749. Since, as we view the matter, the procedural error, granted that there was an abuse of discretion in the matter, *did not and could not have affected the correct result* reached by the trial court, there is no prejudice, and consequently, no reversible error." [Appendix A at 6a (Emphasis Added)]

The opinion below is not in conflict with standards established by this court in criminal litigation. Since the errors in the trial court *did not and could not* have changed the ultimate result, the writ should be denied.

3. The Decision Below Does Not Conflict With Decisions of Other State and Federal Courts.

The petitioners assert that subsequent to this court's decision in *Powell* every lower court which has spoken to the issue concludes that the right to counsel addressed in that opinion, applies equally to civil cases.

The cases cited by the petitioners involve an *absolute* denial of the right to counsel. *Steen v. Board of Civil Service Commissioners*, 160 P. 2d 816, 26 Cal. 2d 716 (1945); *Mendoza v. Small Claims Court*, 49 Cal. 2d 668, 321 P. 2d 9 (1958); *Simon v. Liberman*, 193 Neb. 321, 226 N.W.2d 781 (1975). The only exception is *Roberts v. Anderson*, 66 F. 2d 874 (10 Cir. 1933), where an Oklahoma Probate Court denied a party's right to be heard through counsel of her selection, except by permission of and in subordination to, counsel she did not select and who constantly opposed her own counsel. In *Roberts*, the court decided that the Oklahoma Probate Court judgment determining heirship was not entitled to full faith and credit in a federal court suit to quiet title.

The case at bar is factually distinct from the cases cited by the petitioners. As we have said, here, the petitioners were ably represented during the trial below by T. H. Freeland, III, one of their attorneys of choice, and, on appeal, by Mr. Freeland and their Arkansas counsel as well.

Since there was no denial of the right to counsel in the case at bar, there is no conflict with the decisions from other jurisdictions cited by the petitioners and the writ should be denied.

CONCLUSION

The Arkansas Supreme Court properly held that the exclusion of the petitioners' Arkansas counsel from the courtroom was not prejudicial and, therefore, the harmless error rule applied. As Justice Fogleman, writing for the majority, said:

"Since, as we view the matter, the procedural error, granted that there was an abuse of discretion in the matter, *did not and could not have* affected the correct result reached by the trial court there is no prejudice, and consequently, no reversible error." [Appendix A at 6a (Emphasis Added)]

That the petitioners have not been prejudiced by the exclusion of their Arkansas counsel from the courtroom is most pointantly demonstrated by their failure, even at this late date, to point out any evidence or legal arguments which were available but not presented by their Mississippi counsel.

Respondents respectfully submit that the petition for the writ of certiorari should be denied.

Respectfully submitted,

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August 16, 1978